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No. 89-5867

In The

Supreme Court of the United States

October Term, 1989

SHIRLEY W. IRWIN,

Petitioner,

v.

VETERAN'S ADMINISTRATION, ET AL.,

Respondents.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. WHETHER THE THIRTY DAY PERIOD FOR FILING SUIT FOR FEDERAL EMPLOYEES PURSUANT TO 42 U.S.C., 2000E-16 IS AN ABSOLUTE JURISDICTIONAL REQUIREMENT, OR, AS IN NONFEDERAL EMPLOYMENT DISCRIMINATION CASES, IN THE NATURE OF A STATUTE OF LIMITATIONS, SUBJECT TO EQUITABLE TOLLING?

2. WHETHER RECEIPT OTHER THAN ACTUAL RECEIPT BY A CLAIMANT OR A CLAIMANT'S ATTORNEY OF THE NOTICE OF FINAL ACTION ISSUED BY THE EEOC IS SUFFICIENT FOR INITIATING THE RUNNING OF THE THIRTY-DAY FILING REQUIREMENT APPLICABLE TO FEDERAL EMPLOYEES UNDER 42 U.S.C., 2000E-16(C)?

LIST OF ALL PARTIES

The parties to the proceeding in the Court of Appeals were: Shirley W. Irwin, Petitioner: Veteran's Administration, an official agency of the United States of America; Irvin D. Noll; Robert L. Cimber; Charles Stenslie; James Strong, Respondents.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (J.A. 33) is reported at 874 F.2d 1092. The opinion of the District Court (J.A. 32) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 13, 1989. The order by the Court of Appeals

denying the Petition for Rehearing was entered on July 13, 1989. The Petition for Writ of Certiorari was filed on October 10, 1989. This Court granted the Petition on February 20, 1990. The Court's jurisdiction is invoked under **28 U.S.C. 1254(1).**

RELEVANT STATUTORY PROVISIONS

The pertinent and relevant provisions of **42 U.S.C. 2000e-16(c)** are set out verbatim, together with appropriate citation therefor in the Appendix.

STATEMENT OF THE CASE

This case was brought against the Veterans Administration pursuant to **42 U.S.C. 2000e-16** and **29 U.S.C. 621** by one of its employees claiming discrimination on the basis of age and handicap, as well as for retaliation for his seeking redress for past acts of discrimination by the agency. Irwin also sought actions against individual named defendants under **42 U.S.C. 1985 and 1986.** Further, Irwin alleged that his constitutional rights under the First and Fifth Amendments had been violated by the individual Defendants.

(i) COURSE OF THE PROCEEDINGS

This case was dismissed by the District Court by two separate orders of dismissal involving all of Appellant's claims (J.A. 32). From these orders of dismissal Irwin appealed. The Fifth Circuit Court of Appeals held that the

filing period stated in **42 U.S.C. 2000e-16(c)** was an absolute jurisdictional requirement and receipt at the office of Petitioner's attorney, rather than actual receipt of notice by the claimant or personally by his attorney, began the running of the 30-day period for filing a complaint under Title VII. The Court below also determined that Irwin did not sufficiently plead claims under **1985 and 1986** distinct from Title VII so as to maintain actions against the individual defendants, and that the District Court did not have jurisdiction over the age discrimination claim since it was not recorded by the EEO Counsellor that Irwin filed a formal age discrimination complaint against his agency. Irwin here does not challenge the decision concerning claims under **1985 and 1986**, the constitutional claims or the age discrimination complaint.

(ii) STATEMENT OF THE FACTS

For clarity, Petitioner includes here a synopsis of transactions leading up to the filing of Petitioner's complaint:

Petitioner, a handicapped former employee of the Veterans Administration Medical Center, Waco, Texas, while employed had administratively registered complaints of improper conduct and wrongdoing by certain employees at the VAMC. As a result of these complaints of wrongful conduct by others, efforts were made by the individual defendants to obtain Irwin's voluntary retirement by offering him the alternatives of early retirement or termination. Based upon information supplied to Irwin respecting the amount of retirement pay he would receive, which representation proved false and misleading, Irwin retired. When the anticipated retirement receipt

proved not forthcoming, Irwin appealed to the Merit Systems Protection Board his retirement decision. It was found that Irwin's retirement had been involuntarily made. The Merit Systems Protection Board set aside his retirement and reinstatement of employment was ordered.

When Irwin returned to work he was in short order terminated, with a termination date of April 17, 1986. Irwin, on the day of his termination, began attempts to locate and contact the EEO Counselor at the V.A. Medical Center and an appointment was made by the Counselor for a time after 30 days from Irwin's termination. The EEO Counsellor set an appointment for Irwin for June 23, 1986. Irwin thereafter filed his appeal through the EEOC which entered its decision on March 19, 1987 dismissing the appeal for failure to contact the EEO Counselor within 30 days from the event of discrimination.

Notice of the decision by the EEOC was received by the office of Jon R. Ker, attorney for Irwin on March 23, 1987. However, on March 22, 1987, Mr. Ker had departed his office and Waco, Texas for active duty with his U. S. Army Reserve Unit for training within the Republic of Korea. Actual notice of the EEOC's final action and notice of right to sue was not had by Ker until April 10, 1987. Irwin's attorney is a sole practitioner. Irwin filed his affidavit in response to the Trial Court's request (J.A. 9) indicating to Irwin's best information he received the notice from EEOC on April 7, 1987 (J.A. 12). However, the envelope received by Irwin indicates an April 7, 1987 date upon it (J.A. 8). The return receipt signed by Irwin was never produced by the agency.

Suit was filed in the United States District Court for the Western District of Texas on May 6, 1987, within thirty days of actual receipt by Irwin and Attorney Ker of the notice of right to sue of the EEOC, but more than thirty days after receipt at the office of Attorney Ker.

SUMMARY OF THE ARGUMENT

It is well established that Title VII actions in the private sector are subject to waiver, estoppel and equitable tolling. Therefore, the filing periods applicable to the private sector both for contacting the EEOC for the purposes of filing an initial charge and for the purposes of filing suit in the District Court are not jurisdictional, but rather akin to a statute of limitations. When Congress enacted the amendments to the Civil Rights Act of 1964 clearly establishing access by federal employees to the courts, it intended that the filing period applicable to such federal employees would likewise be subject to waiver, estoppel and equitable tolling. The rationale utilized by this court in establishing that the private sector Title VII filing periods are not jurisdictional is applicable to Title VII suits in the public sector. The remedial character of the act calls for liberal construction and interpretation to assure that the purposes of the statute are achieved and that the interests of the protected class are preserved.

Even if the filing period for federal employees is found to be jurisdictional, the time of initiation of the 30-day filing period properly begins from the time of actual receipt and notice to the federal employee claimant, or at

a minimum, from the time of actual receipt and notice to the claimant's attorney under specified circumstances. The remedial nature of Title VII should require actual notice to the claimant in order that the claimant's rights be protected from loss due to circumstances beyond the claimant's control. The requiring of actual notice and receipt by the attorney for claimant, if the doctrine of constructive notice is applied to Title VII actions by federal employees, comports with the rationale of interpreting the remedial statute in favor of claimants thereunder. Even if Congress intended that constructive notice apply to suits by federal employees under Title VII, it did not intend that constructive notice upon constructive notice be applicable.

ARGUMENT

I

WHETHER THE 30-DAY PERIOD FOR FILING SUIT FOR FEDERAL EMPLOYEES PURSUANT TO 42 U.S.C. 2000e-16 IS AN ABSOLUTE JURISDICTIONAL REQUIREMENT, OR, AS IN NON-FEDERAL EMPLOYMENT DISCRIMINATION CASES, IN THE NATURE OF A STATUTE OF LIMITATIONS, SUBJECT TO EQUITABLE TOLLING?

In *Zipes vs. Transworld Airlines, Inc.*, 455 U.S. 385, 102 S. Ct. 1127, 71 L.Ed.2d 234 (1982), this Court held that the timely filing of an employment discrimination charge with the Equal Employment Opportunity Commission (EEOC) was not a jurisdictional prerequisite to a suit under Title VII of the Civil Rights Act of 1964 against private employers. The time limit for the filing of a

charge of discrimination was, therefore, found to be subject to waiver, estoppel, and equitable tolling. Later, this Court addressed the period for filing suit applicable to private sector actions under Title VII. While determining under the facts of that case equitable tolling was not to be applied, still the reasoning of the court showed that the 90-day period for private sector actions was not jurisdictional. *Baldwin County Welcome Center vs. Brown*, 466 U.S. 147; 104 S. Ct. 1723; 80 L.Ed.2d 196 (1984)(per curiam).

Against this settled backdrop relating to private sector suits, the circuits are in conflict as to the characterization of the 30-day filing period of **42 U.S.C. 2000e-16(c)** applicable to discrimination suits of federal employees. The Fifth Circuit below continued its prior holding that the 30-day period operates as an absolute jurisdictional limit. *Irwin vs. Veterans Administration*, 874 F.2d 1092 (5th Cir. 1989)[1] The Seventh Circuit has likewise held the time limits promulgated concerning federal employment discrimination are jurisdictional. In *Sims vs. Heckler*, 725 F.2d 1143 (7th Cir. 1984) the court there addressed the issue of the requirement that a federal employee asserting employment discrimination must contact an Equal Opportunity Counselor within thirty (30) days of the incident giving rise to his claim, and held that such 30-day time limit is jurisdictiona1.[2] The Ninth Circuit seems to

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[1] See also *Bell vs. Veterans Administration Hospital*, 826 F.2d 357 (5th Cir. 1987); *Eastland vs. Tennessee Valley Authority*, 553 F.2d 364 (5th Cir. 1977), cert. denied, 443 U.S. 985, 98 S.Ct. 611, 54 L.Ed.2d 479 (1977).

[2] The Court there construed 29 CFR 1613.214(a)(1)(i) which states in pertinent part that a federal agency may accept

(Continued on following page)

indicate that the 30-day time limit of **Section 2000e-16(c)** is jurisdictional. *Rice vs. Hamilton Air Force Base Commissary,* 720 F.2d 1082 (9th Cir. 1983). Footnote number 1 in that case states that it was not necessary for the court there to address and reexamine its holdings that Title VII civil suit filing periods are jurisdictional, while within the same breath discussing the effect of *Zipes,* thereby leaving a question mark as to where the Ninth Circuit now stands on this issue.[3]

The opposite position concerning the jurisdictional characterization question is taken by the Sixth, Tenth, Eleventh and D.C. Circuits. See *Boddy vs. Dean,* 821 F.2d 346 (6th Cir. 1987) (concerning the time limit for contacting an EEO counselor by a federal employee under 29 CFR 1613.214(a)); *Martinez vs. Orr,* 738 F.2d 1107 (10th Cir. 1984) (concerning **42 U.S.C. 2000e-16(c)**(Citing *Zipes*)); *Milam vs. United States Postal Service,* 674 F.2d 860 (11th Cir. 1982) (stating at page 862 that the Fifth Circuit holding in *Eastland vs. Tennessee Valley Authority,* supra, that

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a discrimination complaint only if "the complainant brought to the attention of the Equal Opportunity Counselor the matter causing him to believe he had been discriminated against within 30 calendar days of the date of that matter or, if a personnel action, within 30 calendar days of its effective date."

[3] In a later case concerning the issue of the time limit for contacting an EEO counselor under 29 CFR 1613.214(a)(i), the Ninth Circuit there treated the time limit as a statute of limitations subject to waiver, estoppel and equitable tolling relying upon *Zipes. Boyd vs. United States Postal Service,* 752 F.2d 410 (9th Cir. 1985), at page 414.

2000e-16(c) was jurisdictional, was no longer good law in view of *Zipes*); and *Saltz vs. Lehman,* 672 F.2d 207 (D.C. Cir. 1982) (concerning the time limit for filing with the EEOC).

Petitioner asserts that the rationale of *Zipes* and *Baldwin County Welcome Center,* is properly applicable to public sector Title VII actions. Moreover, the circuit cases holding that the filing period here in question is not jurisdictional are correct and persuasive. It should now be resolved that the filing period contained within **42 U.S.C. 2000e-16(c)** is subject to waiver, estoppel and equitable tolling.

In interpreting the statutory provision "within thirty (30) days of receipt of notice of final action"[4], neither the statute nor the legislative history provides much in the way of guidance. However, as noted by the Tenth Circuit in *Martinez*[5]:

> "The legislative history of the amendment indicates that in extending the coverage of Title VII to federal employees, Congress intended to give them essentially the same rights and remedies as had been provided employees in the private sector." 1972 *U.S. Code Cong. & Ad. News* 2137, at 2157-60.

In Footnote 2 of the opinion, the *Martinez* court went further and stated:

> "The House Report emphasizes that Equal Employment Opportunity is of 'paramount significance' in the Federal Service. H. R. Rep. #238,

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[4] **42 U.S.C. 2000e-16(c).**

[5] 738 F.2d at 1110

92nd Cong., 2nd Sess., reprinted in 1972 *U.S. Code Cong. & Ad. News* 2137, 2157. Noting that present laws 'do not permit industry and labor organizations to be the judges of their own conduct in the area of employment discrimination' the report concludes that '[t]here is no reason why government agencies should not be treated similarly'. Ibid at 2159-60."[6]

Where, as here, Congressional purposes are unclear, the Courts have traditionally resolved ambiguities in remedial statutes in favor of those whom the legislation was designed to protect. *Laffey vs. Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976). Title VII, being remedial in character, should here be liberally construed to achieve its purpose as it pertains to federal employment. And where the statutory framework results in procedural ambiguity, those ambiguities are generally, and should be, resolved in favor of the complaining party. *Bell vs. Brown*, 557 F.2d 849 (D.C. Cir. 1977).

> "That approach . . . reflects not only the manifest importance of Title VII rights to complaining parties, but also the broad national commitment to eliminating such discrimination and the importance of private suits in fulfilling that commitment."[7]

A finding now by this Court extending the *Zipes* rationale to the federal employment sector and establishing clearly that the time limit of **2000e-16(c)** is not jurisdictional but rather subject to waiver, estoppel and equitable tolling would promote the remedial nature of the act. Such a conclusion now would prevent Title VII

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[6] 738 F.2d at 1110.

[7] *Bell*, 557 F.2d at 853.

federal employee claimants from losing their actions by virtue of fortuitous circumstances beyond their control.

II

WHETHER RECEIPT OTHER THAN ACTUAL RECEIPT BY A CLAIMANT OR A CLAIMANT'S ATTORNEY OF THE NOTICE OF FINAL ACTION ISSUED BY THE EEOC IS SUFFICIENT FOR INITIATING THE RUNNING OF THE 30-DAY FILING REQUIREMENT APPLICABLE TO FEDERAL EMPLOYEES UNDER 42 USC 2000e-16(c)?

Even if it is now determined that the 30-day filing period applicable to federal employees under Title VII indeed be jurisdictional, the issue remains as to what is the triggering event for the initiation of that 30-day period, an issue which also has resulted in conflicting opinions among the circuits.

In *Irwin*, the Fifth Circuit relied upon its decision in *Ringgold vs. National Maintenance Corp.*, 796 F.2d 769 (5th Cir. 1986), a private employee action subject to the longer period for filing suit, to hold that constructive notice under **2000e-16(c)** applied from time of receipt at the claimant's attorney's office of the notice of right to sue irrespective of actual knowledge or receipt by the claimant or claimant's attorney. Thus, at least within the Fifth Circuit, no actual notice is required to the claimant or claimant's attorney for the 30-day filing time limit to begin. Indeed, this holding by the court below takes what Petitioner asserts as an unreasonable position of imputing constructive notice to claimant's attorney which likewise binds the claimant even in the absence of actual notice to the attorney.

The opposite result in interpreting "receipt of notice" under the act is reached in the District of Columbia Circuit and the Sixth Circuit. In these circuits the actual notice to the claimant is the sole triggering event. In *Bell vs. Brown*, supra, the D. C. Circuit stated:

> "Since the 'receipt of notice' and not its mailing, is expressly made the event inaugurating the 30-day period, plainly it begins to run only from the time the notice comes into the recipient's hands. The statutory language, however is non-committal as to whether receipt by a representative is equivalent for this purpose to receipt by the employee, and the legislative history, though extensive, yields no significant indication in this regard."[8]

> " . . . A reading of 'receipt' as a call for personal receipt by the affected employee, harmonizes well with the fundamental objectives of **717(c)**. It comports, too, with the every day realities of Title VII litigation."[9]

> " . . . As much here as in *Coles* (*Coles vs. Penny*, 531 F.2d 609, at 615), 'we doubt that Congress intended to provide a judicial remedy – [which] require[s] de novo consideration – which is so easily forfeited by those whose rights it vindicates. . . . A statutory construction likely in so many cases to render meaningless the provision of a judicial remedy is hardly the 'practical and reasonable' one that we should seek."[10]

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[8] *Bell*, 557 F.2d at 852-53

[9] Ibid at 853

[10] Ibid at 854

While the *Bell* court did recognize the imputation of notice generally from attorney to client, still it determined that in tying the commencement of the suit period to "receipt of notice" the Congress in Title VII actions contemplated an actual notice to the litigant:

> "Put another way, we cannot believe that Congress willed the subversion of Section 717(c) by an incompatible invocation of imputed notice.[11]

Like the D.C. Circuit, the Sixth Circuit has determined that receipt of notice pursuant to **42 U.S.C. 2000e-16(c)** contemplates actual notice by the complainant. In relying upon *Bell vs. Brown*, supra, the Sixth Circuit stated in *Rea vs. Middendorf*, 587 F.2d 4 (6th Cir. 1978), at page 5:

> "Thus, although notice must be given to the representative, if any, the date of this notice is not the determinative date for initiation of the 30-day filing period."[12]

A hybrid approach has been reached by the Seventh and Eighth Circuits. The Ninth Circuit, on the other hand,

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[11] Ibid at 857. Compare *Brown vs. National Highway Traffic Safety Administration*, 673 F.2d 544 (D.C. Cir. 1982) which case concerned the filing period found in **5 U.S.C. 7703**, finding that actual notice to complainant is required, citing *Bell*. See also *Josiah-Faeduwor vs. Communications Satellite Corp.*, 785 F.2d 344 (D.C. Cir. 1986); *Cooper vs. Lewis*, 644 F.2d 1077 (5th Cir. 1981).

[12] See also *Com. of Ky. Ex. Rel. Cabinet for Hum. Res. vs. Brock*, 845 F.2d 117 (6th Cir. 1988), footnote 3 which characterizes Congress as having elected to require actual notice of final administrative action to commence the accrual of limitations concerning **42 U.S.C. 2000e-16(c)**, at page 121.

while not being as clear as the Seventh and Eighth Circuits, has indicated that notice to the attorney of a right to sue initiates the running of the 30-day time limit where that attorney had requested the issuance of the notice of right to sue letter. See *Gonzales vs. Stanford Applied Engineering, Inc.*, 597 F.2d 1298, 1299 (9th Cir. 1979) (per curiam).

In *Craig vs. Department of Health, Education and Welfare*, 581 F.2d 189 (8th Cir. 1978) the Eighth Circuit, too, relied upon *Bell vs. Brown*, supra, to hold that the Equal Employment Opportunity Act should be liberally construed since it is a remedial statute. The Court there, however, differed from *Bell* by finding specific circumstances under which notice to the designated representative would satisfy the requirement of the statute and begin the running of the filing period. The Court found that notice was sufficient if: (1) a registered or certified letter or other written notice requiring the recipient to acknowledge receipt therefor, is sent to the employee, and the employee personally acknowledges such receipt; or (2) a registered or certified letter or other written notice requiring the recipient to acknowledge receipt therefor, is sent to the representative designated by the employee. In this instance the Court specified that the notice must be addressed in accordance with the specific directions of the employee and receipt must be acknowledged personally by the designated representative.[13]

The Seventh Circuit, in addressing the longer filing period for the private sector discriminatee reached a

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[13] *Craig*, 581 F.2d at 193

similar conclusion. In *Jones vs. Madison Service Corp.*, 744 F.2d 1309 (7th Cir. 1984), the Court there stated:

> "We believe that the most crucial concept in this matter, and a concept that determined many of these decisions, including [*Archie vs. Chicago Truck Drivers, Helpers and Warehouse Workers Union*, 585 F.2d 210 (7th Cir. 1978)], is the actual knowledge that the time period in which a suit can be filed has commenced. Such knowledge is conveyed equally well through personal receipt of the right to sue letter by the Claimant and through receipt of that letter by the attorney representing him in the action.
>
> " . . . With the importance of this consideration in mind, we hold that the 90-day period commences when the attorney receives the letter as long as the following facts are undisputed:
>
> 1. The attorney did in fact represent claimant at the time the letter was received;
>
> 2. The EEOC was notified of that representation by either claimant or the attorney;
>
> 3. The attorney did in fact receive the letter; and
>
> 4. The date on which the letter was received.[14]

Petitioner asserts that the remedial nature of the statute requires actual notice to the Title VII claimant in order to preserve that claimant's action and prevent dismissal due to unfortunate or fortuitous circumstances beyond

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[14] *Jones*, 744 F.2d at 1313-1314. See also *Thomas vs. KATV Channel 7*, 692 F.2d 548 (8th Cir. 1982) requiring personal acknowledgment by the representative in order to bind claimant in a private sector Title VII action.

his control. Therefore, Petitioner urges that this Court reject the position taken by the Fifth Circuit in favor of expanding the effect of *Zipes* to public employment sector litigation under Title VII.

The policy of liberally construing remedial statutes so as to fully protect the intended class, should here be applied to require actual notice to claimant or, at least, actual notice to the claimant's representative of the right to sue letter as being the triggering event for the "receipt of notice". Nor is a different result mandated by *Link vs. Wabash R.R. Company*, 370 U.S. 626, 82 S. Ct. 1386, 8 L.Ed.2d 734 (1962). *Link* did not involve a remedial statute, particularly one with a short period of time for filing suit. Rather, it concerned actions by counsel long after suit had been filed. The objectives of eradicating invidious discrimination in the work place, including the federal work place, should be found to override the more general proposition of *Link* concerning the "system of representative litigation, in which each party is deemed bound by the acts of his lawyer agent and is considered to have notice of all facts, notice of which can be charged upon the attorney." *Link*, 370 U.S. at 634.

Further, requiring actual notice to the claimant, or at least to the claimant's representative, in furtherance of protecting an intended class under the remedial statute, would not require that *Link* be overturned. By requiring actual notice as the triggering event for the 30-day filing period, Petitioner urges that this Court would be furthering the remedial spirit as well as correctly interpreting the language of the statute and the intent of Congress.

As additional support for this position the Court may look to cases interpreting the administrative regulations promulgated since the enactment of Title VII.

> "There is another guidepost to proper interpretation of the 'receipt of notice' upon which **Section 717(c)** trades. The Civil Service Commission's interpretations of that section have consistently reflected the theme that the 30-day period for suit is not set in motion until notice of the final administrative action is obtained by the affected employee, irrespective of when it might reach a representative. That should dispel any lingering doubt as to the construction that the section should command in the courts.[15]

While the Petitioner here is cognizant that the Bell court was reviewing the predecessor of the regulations now in effect[16], the result is the same. Despite the deletion of the words "his" in the current regulation, prior interpretations given by the Civil Service Commission, as best as Petitioner has determined, have followed through the transition to the Equal Employment Opportunity Commission and are followed by it.

As further stated by the *Bell* court:[17]

> "The evident purpose of the notice requirement is to inform that the administrative process has run its course and to admonish that the brief

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[15] *Bell vs. Brown*, 557 F.2d at 854 interpreting 37 Fed. Reg. 22723 (1972), as amended by 37 Fed. Reg. 25699 (1972), and 5 C.F.R. 713.281 and 713.282 (1976)

[16] 29 C.F.R. 1613.281

[17] *Bell vs. Brown*, 557 F.2d at 857

period for initiating a lawsuit is about to commence. Like the Civil Service Commission, we think Section 717(c) contemplates service of notice on the employee. That construction is reasonable enough in light of the many instances of employees never having counsel, and those wherein there may be doubt as to the extent of legal representation – for the administrative phase only, or for all purposes. We share also the position that Section 717(c) additionally requires service on counsel for the employee when so represented as a 'practical necessity if the thirty-day filing requirement is not to become an unintended booby trap.'[18] And especially in view of the tight time limitation on suit, filing, the reality that counsel are often unavailable – for example, because away on business or vacation – and the prospect that a great deal of employment-discrimination litigation will be handled by solo practitioners rather than large firms, there surely would be another unintended booby-trap if the doctrine of imputed notice were allowed to displace the statutory assumption that the employee will be given notice both personally and actually."

Surely Judge Robinson had polished well his crystal ball to envision so clearly the facts involved in this case now under discussion and to foresee the dramatic, if not devastating, effects application of constructive notice would have.

In this case, suit was filed within 30 days of the *actual* receipt of notice by the complainant of his right to sue issued by the EEOC, (J.A. 3) but more than 30 days

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[18] Quoting *Copeland vs. Brennan*, 414 F. Supp. 644 (D.D.C. 1975)

after receipt at the office of Petitioner's counsel. Receipt at the attorney's office was acknowledged by a non-lawyer employee. Petitioner's counsel is a sole practitioner and has no other attorney sharing office space. As stated in his affidavit to the trial court (J.A. 27), Petitioner's counsel had departed Waco, Texas for temporary military duty in the Republic of Korea one day prior to receipt at his office of the notice issued by the EEOC. Actual notice to Petitioner's counsel was subsequent to the actual notice to Petitioner.

The finding by the Fifth Circuit below amounts to constructive notice upon constructive notice since Irwin was bound by receipt by a non-lawyer at a time when the attorney was absent and could not have had actual knowledge of such receipt or act upon the notice received. It is difficult to conceive that Congress, in enacting Title VII, would have intended the remedial relief afforded by the Act to be defeated by circumstances over which a claimant has little or no control but for which the consequences are so severe. Such a harsh rule is the result under the decision of the Fifth Circuit in this case.

Likewise, it is difficult to conceive that requiring personal acknowledgment by a claimant, or at least by claimant's representative, places an onerous burden upon the EEOC. Contrary to the position taken by the Fifth Circuit, Petitioner submits that the remedial purposes intended through the act are more correct as a background for interpreting Congress' intent here than the background of Rule 5b, **Federal Rules of Civil Procedure**.

If the policy of liberally construing the remedial statute to allow full protection to the intended class be applied, the result should be that receipt of notice occurs only upon actual receipt by a claimant or, at a minimum, upon actual receipt by claimant's attorney where the attorney has, in fact, (1) represented claimant through the administrative process, and such representation remains in effect at the time of actual receipt, (2) the EEOC had been notified of that representation, and (3) the notice of right to sue letter issued by the EEOC, if addressed to the attorney, is sent by registered or certified mail and is acknowledged personally by the attorney. This does not place an onerous or unreasonable burden upon the EEOC, but more correctly places the emphasis upon the protection of the intended class. This is the heart and thrust of the remedial statute in question. The effect would also be to protect the claimant without doing away with our representative system of justice. On the other hand, where constructive notice applies other than by actual notice to the attorney, then the claimant is subjected to the unreasonable position of constructive notice upon constructive notice and subject to having his claim terminated through no fault of his own or that of his attorney.

CONCLUSION

For the foregoing reasons, the rulings below should be reversed and this matter remanded to the United States District Court, Western District of Texas, Waco Division, for trial.

Respectfully submitted,

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APPENDIX

42 U.S.C. 2000e-16

TITLE VII CIVIL RIGHTS ACT OF 1964 – SECTION 717(c)

EMPLOYMENT BY FEDERAL GOVERNMENT

" . . . (c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant."